Supreme Court, U.S.
FILED
04-1486 MAY 9 - 2005
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL,
Petitioner

v.

RITA BASTIEN,
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Speech or Debate Clause of the U.S. Constitution, article I, section 6, clause 1, preclude federal court adjudication of claims under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000), filed by a congressional employee whose job duties are an integral part of the legislative process?

2. Is information gathering, without subpoena, by a member of Congress or his aide for the purpose of assisting a Member in the discharge of constitutionally delegated responsibilities an activity within the legislative sphere and thereby protected by Speech or Debate Clause immunity?

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PETITION FOR WRIT OF CERTIORARI

The Senate Chief Counsel for Employment, on behalf of The Office of Senator Ben Nighthorse Campbell, former office of the former United States Senator,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

[1] The Office of Senator Ben Nighthorse Campbell ceased to exist on January 3, 2005. See U.S. CONST. amend. XX, § 1. On January 19, 2005, the Senate Chief Counsel for Employment, on behalf of The Office of Senator Ben Nighthorse Campbell, filed a Motion to Dismiss Appeal and Vacate Judgment on Grounds of Abatement in the United States Court of Appeals for the Tenth Circuit. That motion is pending before the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a)[2] is reported at 390 F.3d 1301. The order of the district court granting Petitioner's motion to dismiss for lack of subject matter jurisdiction (App. 36a-53a) is reported at 209 F. Supp. 2d 1095.

JURISDICTION

The court of appeals entered judgment on December 10, 2004. On February 10, 2005, Petitioner filed an application for an extension of time to file a petition for writ of certiorari. On February 11, 2005, Justice Breyer extended the time within which to file a petition for writ of certiorari to and including May 9, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause of the United States Constitution, article I, section 6, clause 1, provides: "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

STATUTORY PROVISION INVOLVED

Section 413 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1413, provides as follows.

PRIVILEGES AND IMMUNITIES

> The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any

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[2] The pages of the appendices to the petition, attached hereto, are referred to as App. ____.

Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, including under article I, section 5, clause 3, or under the rules of either House relating to records and information within its jurisdiction.

STATEMENT

1. The Congressional Accountability Act of 1995 ("CAA" or "the Act"), 2 U.S.C. §§ 1301-1438 (2000), applies select provisions of eleven federal employment laws to United States congressional offices. 2 U.S.C. § 1302(a). The CAA provides two alternative means of redress: an administrative hearing through the Office of Compliance, which is "an independent office within the legislative branch," 2 U.S.C. § 1381(a), and a civil action in federal district court. 2 U.S.C. § 1404. These are the exclusive means of enforcing the rights granted under the Act. See 2 U.S.C. § 1361(d). Although the CAA contains a waiver of sovereign immunity, the Act expressly preserves the Speech or Debate Clause immunity of members of Congress. See 2 U.S.C. § 1413.

2. On April 30, 2001, Respondent, a former employee of Petitioner, filed suit in the United States District Court for the District of Colorado against Petitioner pursuant to the CAA. App. 4a. She subsequently filed an amended complaint in which she alleged that Petitioner violated the CAA by discriminating against her based on her age and retaliating against her for complaining about discrimination. App. 4a, 40a.

Petitioner moved to dismiss the amended complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause

provides absolute immunity to Petitioner against all claims in the amended complaint. App. 4a.

On June 27, 2002, the district court granted the motion to dismiss. App. 53a. Adopting the test established in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), the district court held that "the Speech or Debate Clause provides immunity to Members of Congress and their aides for personnel actions taken with respect to employees whose duties are directly related to the due functioning of the legislative process." App. 46a. The district court found that Respondent's job duties included attending congressional briefings and meetings on behalf of Senator Campbell, preparing memoranda setting forth information she had learned from such briefings or meetings and her recommendations or conclusions, advising Senator Campbell to conduct a congressional oversight hearing on INS operations based on information she had gathered at a congressional briefing, and conveying information to Senator Campbell pertinent to his legislative agenda that she had gathered from her interactions with his constituents. App. 49a-50a. The district court also found that Respondent's "interaction with constituents and her attendance at various meetings and congressional hearings on behalf of the Senator illustrates that [Respondent's] duty was not only to provide Senator Campbell with information, but to take action on behalf of the Senator and provide him with recommendations on various legislative issues and agendas." App. 50a. The district court found that such duties "were directly related to the due functioning of the legislative process." App. 51a, 52a. The district court held, therefore, that the Speech or Debate Clause provided absolute immunity and deprived the court of subject matter jurisdiction of Respondent's claims. See App. 53a. The court reasoned that proceeding with the case "would impermissibly force the [c]ourt to inquire about matters at the very heart of the

legislative process." App. 51a (internal quotation marks omitted).

3. On appeal, the Tenth Circuit reversed and remanded. App. 35a. The Tenth Circuit concluded that Respondent's duties of "'attend[ing] . . . various meetings and congressional hearings on behalf of the Senator . . . and provid[ing] him with recommendations on various legislative issues and agendas . . . [and] gathering and conveying to Senator Campbell himself . . . information critical to the Senator's legislative agenda,'" App. 5a (quoting *Bastien*, 209 F. Supp. 2d at 1105), are "not legislative in nature." App. 7a. The court of appeals also concluded that personnel actions taken with respect to Respondent are not protected by Speech or Debate Clause immunity because "[a] personnel decision is not a 'legislative act.'" App. 34a. The court held that because Respondent's "duties were not legislative and personnel actions allegedly taken against her were not in themselves legislative," the Speech or Debate Clause did not bar court adjudication of her claims. App. 7a.

The Tenth Circuit also held that legislative acts are limited to "official Senate or Senate committee action," App. 28a, such as "voting, conducting hearings, issuing [committee] reports, and issuing subpoenas," App. 26a. The Court excluded from the Clause's coverage "informal information gathering" by a Member or his aide. App. 29a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision warrants this Court's review and reversal because rather than construing the Speech or Debate Clause "broadly to effectuate its purposes," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975), the Tenth Circuit impermissibly narrowed Speech or Debate Clause immunity, thereby undercutting separation of powers principles and allowing judicial intrusion into the legislative

sphere. The Tenth Circuit's decision also warrants review because its holding that "[a] personnel decision is not a 'legislative act' . . . and is therefore not entitled to immunity," App. 34a, directly conflicts with the D.C. Circuit's holding that personnel actions taken with respect to a congressional employee whose job duties are an integral part of the legislative process are legislative acts protected by Speech or Debate Clause immunity. See *Browning*, 789 F.2d at 929-30. Given this conflict, review by this Court is necessary to ensure both that the Speech or Debate Clause is interpreted to effectuate its purposes and that application of the Clause's protections is not dependent on the judicial circuit in which a member of Congress is sued.

I. THE TENTH CIRCUIT'S HOLDING THAT SPEECH OR DEBATE CLAUSE IMMUNITY DOES NOT COVER CONGRESSIONAL PERSONNEL ACTIONS IS ERRONEOUS AND DIRECTLY CONFLICTS WITH D.C. CIRCUIT PRECEDENT

The Speech or Debate Clause of the United States Constitution is a "'great and vital privilege . . . without which all other privileges would be comparatively unimportant or ineffectual.'" *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 866). The Clause is grounded in separation of powers principles that are necessary "'to preserve the constitutional structure of separate, coequal, and independent branches of government.'" *United States v. Gillock*, 445 U.S. 360, 369 (1980) (quoting *United States v. Helstoski*, 442 U.S. 477, 491 (1979)). The central role of the Clause is to "prevent intimidation [of legislators] . . . and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966). The Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland*, 421 U.S. at 502, and

that the "wisdom of congressional approach or methodology is not open to judicial veto," *id.* at 509. "Without exception, [this Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Id.* at 501.

It is well settled that the Speech or Debate Clause governs more than just speeches and debates on the floors and at committee hearings of the House and Senate. The Clause protects *any* act that is within the legislative sphere. "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' *Gravel v. United States*, [408 U.S.] at 624-25, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (citation omitted); see also *Eastland*, 421 U.S. at 501. An act is within the legislative sphere if it is "part of the legislative process – the *due* functioning of the process." *United States v. Brewster*, 408 U.S. 501, 516 (1972). More specifically, an act is within the legislative sphere if it is

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Eastland, 421 U.S. at 504 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

Acts within the legislative sphere "may not serve as a predicate for a suit." *McMillan*, 412 U.S. at 318. "[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland*, 421 U.S. at 503 (citing

McMillan, 412 U.S. at 314). Moreover, the Clause protects legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.* (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

Furthermore, a Member's aides are his *alter egos*.

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause–to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966)–will inevitably be diminished and frustrated.

Gravel, 408 U.S. at 616-17.

In light of the above principles, when a congressional employee's job duties are an integral part of the legislative process – the due functioning of the process – such as when the employee, like Respondent, provides a Member with recommendations on legislative issues and agendas, gathers and conveys information to the Member that is critical to his legislative duties, and attends congressional hearings on behalf of the Member, the employee is performing work within the legislative sphere. Personnel actions taken with respect to that employee are correspondingly within the legislative sphere. Accordingly, neither the employee's job performance nor the personnel actions taken with respect to the employee can form the predicate to a suit.

The primary holding of the court of appeals below – that congressional personnel actions are not within the legislative sphere, App. 34a – directly conflicts with the decision of the D.C. Circuit Court of Appeals in *Browning*, 789 F.2d 923. Indeed, the Tenth Circuit acknowledged this conflict in its opinion. App. 34a ("We hesitate to embrace this [the *Browning*] test. A personnel decision is not a 'legislative act,' as defined by the Supreme Court, and is therefore not entitled to immunity."). The Tenth Circuit's conclusion is erroneous, and the *Browning* decision is consistent with Speech or Debate Clause jurisprudence.

In *Browning*, an African-American Official Reporter of the U.S. House of Representatives[3] was terminated for gross errors. She filed suit alleging that she had been terminated due to her race. The named defendants were the Speaker, the Clerk, the Assistant to the Clerk, and the Director of the Office of Official Reporters of the House of Representatives. Holding that the defendants were immune from suit under the Speech or Debate Clause, the court remanded the case to the district court with instructions to dismiss due to lack of subject matter jurisdiction. In so ruling, the court stated:

> The touchstone to determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were "an integral part of the deliberative and communicative processes [of Congress]," *Gravel*, 408 U.S. at 625, such that the activity is legislative in character. Personnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an

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[3] The court noted that the Reporter's typed recordings were duplicative of the House's electronic tape recording system. See *Browning*, 789 F.2d at 925.

> integral part of the legislative process. Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

789 F.2d at 928-29 (alteration in original) (citation omitted).

This Court has not directly addressed the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions. The closest this Court has come to addressing the issue is *Davis v. Passman*, 442 U.S. 228 (1979). In *Passman*, a former employee of U.S. Congressman Passman sued him alleging he had discharged her because of her gender in violation of the Fifth Amendment to the U.S. Constitution. Congressman Passman moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that no private right of action exists under the Fifth Amendment, and under Rule 12(b)(1) on the basis that the Speech or Debate Clause provided him with absolute immunity from the claims. *Id.* at 232 & n.5. The district court dismissed the case on the 12(b)(6) argument. *Id.* at 232. The *en banc* Court of Appeals for the Fifth Circuit held that the plaintiff did not have a private cause of action under the Fifth Amendment, but the court did not decide the immunity issue. *Id.* This Court reversed the *en banc* court of appeals as to its 12(b)(6) holding. *Id.* at 234. While pretermitting whether the Speech or Debate Clause shielded Congressman Passman's conduct, this Court held "that judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause," *id.* at 235 n.11, and stated that the Clause "protects Congressmen for conduct necessary to perform their duties 'within the "sphere of legitimate legislative activity,"'"

id. (quoting *Eastland*, 421 U.S. at 501). This Court then remanded for a determination of whether the Speech or Debate Clause shielded Congressman Passman's conduct. See *id.* at 249.

Two dissenting Justices thought that the Speech or Debate Clause immunity issue could have been dispositive of the case. They stated:

> The present case . . . involves a preliminary question that may be completely dispositive, for, as the Court recognizes, "the [Speech or Debate] Clause shields federal legislators with absolute immunity 'not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)." *Ante*, at 236 n.11. See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503.
>
> If, therefore, the respondent's alleged conduct was within the immunity of the Speech or Debate Clause, that is the end of this case, regardless of the abstract existence of a cause of action or a damages remedy. Accordingly, it seems clear to me that the first question to be addressed in this litigation is the Speech or Debate Clause claim–a claim that is far from frivolous.

Id. at 251 (opinion of Stewart, J., joined by Rehnquist, J., dissenting) (alteration in original).

Three years after *Passman*, this Court decided *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in which the Court applied an immunity test to the President similar to the test the D.C. Circuit later applied in *Browning* and the one Petitioner urges here. In *Fitzgerald*, a management analyst with the Department of the Air Force was discharged as part of a downsizing after he

had given damaging testimony before Congress about cost overruns at the Defense Department. The analyst sued President Nixon claiming that the termination was in retaliation for the analyst's congressional testimony. President Nixon, who was no longer in office, asserted absolute immunity. This Court held that although the President has no expressly stated, absolute immunity under the Constitution as do members of Congress, *id.* at 750 & n.31, his absolute immunity can be inferred due to "history" and "constitutional tradition" and the President's "unique position in the constitutional scheme," *id.* at 749. The Court held that the basis of this inferred, absolute immunity is the separation of powers. *Id.* The Court further held that the immunity protects the President for any action he takes within his "sphere of responsibility." *Id.* at 760-61; see also *id.* at 749. The President's constitutional sphere of responsibility includes being Commander in Chief of the Armed Forces. See *id.* at 757; see also U.S. CONST. art. II, § 2. That responsibility, the Court held, "must include the authority to prescribe reorganizations and [employee terminations]." 457 U.S. at 757. The Court concluded, therefore, that a court could not second-guess the President's decision to fire staff who fulfilled duties within the President's sphere of responsibility, *id.*, even when those staff were as far removed from the President's immediate sphere as was Fitzgerald, a management analyst working at the Pentagon. As Chief Justice Burger stated in his concurrence:

> [T]he Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking . . . . [J]udicial intrusion through private damages actions improperly impinges on and hence interferes with the independence that is imperative to the functioning of the office of a President.
>
> . . . Absent absolute immunity . . . each suit . . . would involve some judicial questioning of

> Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur . . . . [T]he need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims.

Id. at 761-62 (Burger, C.J., concurring).

Fitzgerald supports the soundness of the *Browning* test because Speech or Debate Clause immunity, like the President's inferred, absolute immunity, is grounded in separation of powers principles. Compare *id.* at 749 (the President's absolute immunity is "rooted in the constitutional tradition of the separations of powers"), with *Gillock*, 445 U.S. at 370 (the Speech or Debate Clause "rest[s] solely on the separation of powers doctrine"). Thus, the purpose of the President's inferred, absolute immunity and the Members' express constitutional immunity is the same – to allow independent functioning of the coequal branches of government within their respective, constitutionally delegated spheres of responsibilities. Compare *Helstoski*, 442 U.S. at 491 (purpose of Speech or Debate Clause is to prevent "intrusion by the . . . Judiciary into the sphere of protected legislative activities"), with *Fitzgerald*, 457 U.S. at 761 (purpose of President's inferred immunity is to prevent "judicial intervention" into the President's "sphere of responsibility"). Indeed, in his concurrence Chief Justice Burger acknowledged that the Court was extending to the President the protections the Speech or Debate Clause affords Members. See *id.* at 762 ("We have decided that in a similar sense Members of both Houses of Congress – and their aides – must be totally free from judicial scrutiny for legislative acts.") (Burger, C.J., concurring).

Congress's "sphere of responsibility" is all federal legislative powers. See U.S. CONST. art. I, § 1. To fulfill legislative responsibilities, a member of Congress must hire and delegate legislative duties to aides; indeed, those aides are the Member's alter egos. *Gravel*, 408 U.S. at 616-17. Just as the President's constitutional mandate of commanding the Armed Forces necessarily includes the authority to manage, without judicial interference, an employee whose duties are within the sphere of the President's constitutionally delegated duties, so too a Member's constitutional mandate of handling all legislative matters necessarily includes the authority to manage, without judicial interference, employees whose duties are within the sphere of the Member's constitutionally delegated duties.

The Tenth Circuit found *Fitzgerald* inapposite because "recognition of the President's absolute immunity derived from '[t]he President's *unique* status under the Constitution.'" App. 31a (quoting *Fitzgerald*, 457 U.S. at 750). While this Court in *Fitzgerald* cited the President's "unique position in the constitutional scheme," 457 U.S. at 749, to justify the Court's inference that the President was entitled to an absolute immunity for his official acts, the Court did so because the President has no textual, absolute immunity. It does not follow that those who do not hold such a "unique" position are not protected by an absolute immunity. Members of Congress are entitled to absolute immunity because the Constitution expressly grants it to them; inferring an immunity for them is unnecessary. Moreover, in *Fitzgerald* this Court did not determine that the President's personnel decisions were protected because of the President's unique position in our government. This Court was faced with two issues: (i) does the President enjoy absolute immunity from civil actions challenging acts within his delegated authority, and, if so, (ii) was the termination of Fitzgerald within the President's

delegated authority. The Court relied on the President's unique position to resolve the first issue. See *id.* at 751. Having resolved that issue, the Court then determined that Fitzgerald's termination "lay well within the outer perimeter of [the President's] authority." *Id.* at 757.

In further support of its position that a personnel decision of a member of Congress is not within the legislative sphere, the Tenth Circuit, citing *Forrester v. White*, 484 U.S. 219 (1988), "observ[ed] that the third branch of government, the judiciary, is not entitled to absolute immunity in making employment decisions." App. 31a. The Tenth Circuit's reliance on *Forrester* is misguided. First, the state judiciary, which was the employer in *Forrester*, is not our third branch of government. Moreover, even when the employer is the federal judiciary, separation of powers concerns are not implicated because the employer and the federal court adjudicating the case are part of the same branch of government.[4]

In summary, the Tenth Circuit erred in rejecting the *Browning* test. When a congressional employee's job duties are an integral part of the legislative process – the due functioning of the process – personnel actions taken with respect to her are within the legislative sphere. Accordingly,

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[4] The federal judicial branch is not subject to most federal employment laws. Section 505 of the CAA, 2 U.S.C. § 1435, provides that the Judicial Conference shall recommend to Congress whether employees of the federal judicial branch shall be governed by employment laws. The Judicial Conference has since recommended that, to preserve the independence of the Judiciary, such laws should not apply to the judicial branch, with the exceptions of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000), and the Uniformed Services Employment and Reemployment Act of 1994, 38 U.S.C. §§ 4301-4333 (2000), which already applied to the judicial branch. See JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, 2-4 (1996).

the Speech or Debate Clause is an absolute bar to judicial interference with those personnel actions.

Review by this Court is essential to effectuate the purpose of the Clause – preserving the constitutional structure of separate, coequal, and independent branches of government – and to prevent the scope of Speech or Debate Clause immunity from being dependent on the judicial circuit in which a Member is sued.

II. THE TENTH CIRCUIT ERRED IN CONCLUDING THAT INFORMAL INFORMATION GATHERING BY A MEMBER OF CONGRESS OR HIS AIDE FOR THE PURPOSE OF ASSISTING A MEMBER IN THE DISCHARGE OF CONSTITUTIONALLY DELEGATED RESPONSIBILITIES IS NOT PROTECTED BY THE IMMUNITY PROVIDED BY THE SPEECH OR DEBATE CLAUSE OF THE U.S. CONSTITUTION

The court of appeals also held that the Speech or Debate Clause does not shield many other activities in which Members and their aides engage as part of the legislative process. Specifically, the court of appeals concluded that legislative acts are limited to "official Senate or Senate committee action," App. 28a, such as "voting, conducting hearings, issuing [committee] reports, and issuing subpoenas," App. 26a. The Court excluded from the Clause's coverage "informal information gathering – either personally by a member of Congress or by congressional aides." App. 29a. This Court has never espoused such a narrow construction of the Clause. "Without exception, [this Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501 (citing cases).

The Tenth Circuit's above conclusion is erroneous because the court misconstrued the difference between a legislative act and a political act. In *Brewster*, this Court explained:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

Brewster, 408 U.S. at 512-13.[5]

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[5] Several Justices believe that even this interpretation of the scope of the Speech or Debate Clause is too narrow. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979) (Brennan, J., dissenting) (Senator's publications of newsletters and press releases critical of government expenditures should be within Speech or Debate Clause immunity's protection); *McMillan*, 412 U.S. at 332 (Blackmun, J., dissenting) (publication and distribution of a report compiled in connection with an officially authorized congressional investigation should be protected by Speech or Debate Clause immunity); *id.* at 342 (Rehnquist, J., concurring in part and dissenting in part) ("I would hold the Members immune had they

In the case at bar, political acts were not at issue. Respondent's duties included attending congressional briefings, hearings and meetings on behalf of Senator Campbell; conveying information to him pertinent to his legislative agenda, including advising him to conduct a congressional oversight hearing on a specific topic; and interacting with constituents on behalf of the Senator to provide him with recommendations on various legislative issues and agendas. App. 5a. The Tenth Circuit's conclusion that these duties "were not legislative in nature," App. 7a, is inconsistent with this Court's ruling that legislative acts are "act[s] which [are] clearly a part of the legislative process – the *due* functioning of the process," *Brewster*, 408 U.S. at 515-16. Attending a congressional hearing on behalf of a Senator for the purpose of providing him with information is unquestionably part of the due functioning of the legislative process. See *Gravel*, 408 U.S. at 615-17. Furthermore, gathering information, whether informally or by subpoena, for the purpose of informing a Senator on matters critical to his legislative agenda is also unquestionably part of the due functioning of the legislative process because "'[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). As the Court has explained, "To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" *Id.* at 505 (citation

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undertaken the public distribution [of a report]. . . ."); *Gravel*, 408 U.S. at 652-55 (Brennan, J., dissenting) ("There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents.") (citing 8 THE WORKS OF THOMAS JEFFERSON, 322-27 (Ford ed. 1904)).

omitted). See also *McGrain*, 273 U.S. at 174 ("the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function"); *Gravel*, 408 U.S. at 629 (the Speech or Debate Clause protects "communications between the Senator and his aides during the term of their employment and related to . . . legislative act[s] of the Senator"). The Tenth Circuit's narrow interpretation of legislative activity also directly conflicts with the D.C. Circuit's decision in *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976):

> We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation. The recent decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), holds that "[t]he power to investigate and to do so through compulsory process plainly falls within" the test for legislative activity announced in *Gravel*. We think this principle must also extend to field investigations by a Senator or his staff. "A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly."

Id. at 1286-87 (parallel citations omitted) (quoting Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1154 (1973)).

Information gathering, with or without subpoena, by a member of Congress or his aide for the purpose of assisting a

Member in the discharge of constitutionally delegated responsibilities is protected by the Speech or Debate Clause of the U.S. Constitution. Accordingly, review by this Court is essential to ensure that the Tenth Circuit's opinion is not used in future cases as authority for a narrow construction of the scope of the Speech or Debate Clause that undercuts its purpose and permits intrusion by the Executive or the Judiciary into the sphere of legitimate legislative activity.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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May 9, 2005